IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

No. 677

KYCOGA LAND COMPANY, a Corporation,
Petitioner,

vs.

KENTUCKY RIVER COAL CORPORATION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

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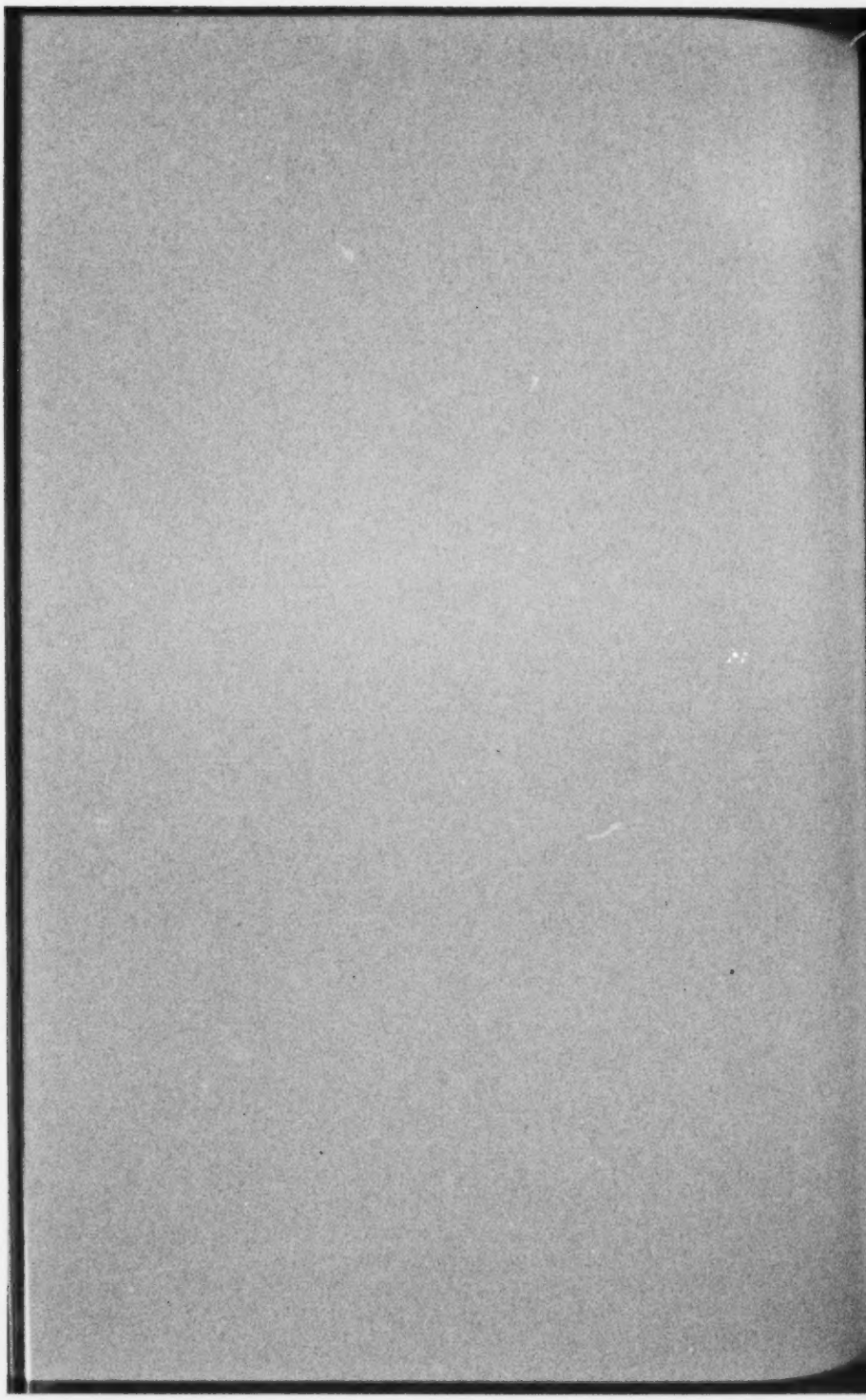

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

An Explanation for the Guidance of the Court

Except for *Item 32* (*Indenture of Coal Lease,* with appended blueprint map, from respondent to Knott Coal Corporation, upon which petitioner strongly relies as showing a deliberate and furtive inclusion of petitioner's tract in its said lease by respondent, and respondent's profit-motive for such inclusion); and sundry other

original exhibits to which the Court's attention is hereinafter especially directed, the exhibits noted as contained in Accopress "Binder A" and "Binder B" and the "Roll" and "Envelope" of "Original Maps" have but little pertinency to this petition and to the Court's consideration of it. These exhibits deal for the most part with the title issue, now definitely adjudicated in petitioner's favor, and with the *quantum* of coal mined from petitioner's land, an issue which is shown to have been subsequently covered by stipulation of the parties. They were transmitted from the District Court in their original form as a concession to economy, and were included in the transcript of record on appeal out of an abundance of caution.

For the greater convenience of the Court in reviewing this cause, and as affording the Court documentary evidence that the respondent, at all times prior to the trespass, had knowledge of petitioner's ownership of the 100 acre tract in controversy and knowingly and deliberately procured its lessee, Knott Coal Corporation, to mine the coal beneath it, petitioner has segregated and identified, in one brown open-edge folder, such of the "Original Papers" and "Original Maps" as are deemed of special significance and pertinency to the points herein relied upon by petitioner, viz:

(a) Original *Cloth Tracing* (taken from envelope of "Original Maps", No. 1) enclosed in letter from C. B. Slemp to Hager & Stewart, Attorneys, dated December 21, 1906 (see letter reproduced in Tr. Vol. III, bot. p. 43), showing manner in which Mr. Slemp proposed at that time that the parties divide the tract in controversy in the *J. R. & M. F. Kelley* v. *R. K. Richards suit* between his company and petitioner's privies in title.

(b) Original Art-Paper Map (same as and contemporary with the foregoing cloth tracing) produced at the trial of this cause from respondent's files by its Chief Engineer and Vice-President, G. Turner Howard, and filed by respondent as "Original Map No. 6".

(c) Respondent's President, W. S. Dudley's folded cloth-mounted copy of the so-called "*Kentucky River Region Map*" (being Original Map No. 17), made in the "Spring—1909", which shows petitioner's 100 acre tract in the form proposed in Mr. Slemp's above mentioned letter and cloth tracing of December 21, 1906.

(d) *Deed* from J. R. & M. F. Kelley to Kentucky River Consolidated Coal Company (one of the Slemp Companies), dated June 8, 1912 (taken from Binder "B" of "Original Papers", Item 51), which conveys the residue of the tract of minerals involved in the *Kelley* v. *Richards* suit after the Kelleys had conveyed to Richard's assignee (Webb & Hoppin, petitioner's direct grantors) by deed dated June 5, 1911 (Tr. Vol. III, p. 22) the 100 acre tract of minerals in controversy in *this* suit.

(e) *Indenture of Lease* from respondent, Kentucky River Coal Corporation, to Knott Coal Corporation, dated March 15, 1921 (taken from Binder "A" of "Original Papers", Item 32).

(f) The *Blueprint Map* appended to and made a part of said indenture of lease. (Original Maps, No. 19.)

(g) *Blueprint Map* showing Knott Coal Corporation's Leasehold and Mine-Workings (taken from "Roll" of "Original Maps," No. 7).

(h) Full length *Blueprint* of respondent's *Fox, Peck & Pursiful Map* (taken from "Roll" of "Original Maps," No. 11).

(i) *Cloth Tracing* given petitioner's Attorney *Tynes* by respondent's Chief Engineer *Howard,* incorrectly

representing no No. 9 coal to be on the tract in controversy.

(j) Petitioner's so-called *"Composite Oral Argument Map"* (used in the oral argument of this cause in the Circuit Court of Appeals), which shows the form and location of petitioner's 100 acre tract, both as originally proposed by Mr. Slemp and as finally conceded and conveyed by the Kelleys to petitioner's direct vendors, Webb & Hoppin, by deed dated June 5, 1911, (Tr. Vol. III, page 22), in settlement of the *Kelley* v. *Richards* suit, in its relation to respondent's adjoining and well nigh encircling lands, and the tunnels driven under the tract by respondent's lessee in the course of the trespass.

(k) The *Bill of Complaint* in the chancery cause entitled *Knott Coal Corporation* v. *Kentucky River Coal Corporation*, filed in the Circuit Court of Richmond, Virginia, in September, 1931, shortly after *this* suit was instituted (Original Papers, item 61).

Attached to the front of each of the foregoing original exhibits (and at the top of each exhibit printed in Tr. Vol. III and herein referred to) is a notation giving the page of Tr. Vol. II where the exhibit was *offered in evidence* and the page (or pages) where the *witness* (or witnesses) *testified concerning* such exhibit.

Proceedings in the District Court

In this suit, originally instituted in February, 1930, by the petitioner (oft hereinafter called "plaintiff") against the respondent (oft hereinafter called "defendant"), Kentucky River Coal Corporation, owner of a large body of coal lands in Eastern Kentucky, and Knott Coal Corporation, which was engaged in mining coal under an indenture of lease from Kentucky River Coal Corporation, plaintiff sought, primarily, to quiet its title to a 100 acre

tract of coal land situate in Knott County, Kentucky, and incidentally to recover from the defendants, inter alia—

(a) Damages for the wrongful, intentional and willful mining and appropriation to their own use 114,000 tons of the No. 9 seam or vein of coal underlying said tract;

(b) Damages on account of having wrongfully mined a large tonnage of the No. 9 seam of coal from the land of others through the mine-entries, tunnels and passage-ways driven by them through and under said tract;

(c) Damages in the amount of double the market value of so much of said coal as had been mined and sold from plaintiff's tract after section 1244a-1 of Carroll's Kentucky Statutes became effective, to-wit, on June 20, 1928.

Defendant's answer to plaintiff's original and amended petitions in equity did no more, insofar as here pertinent, than traverse each and every material allegation of plaintiff's petitions, claiming, nevertheless, title to the tract of land to be in Kentucky River Coal Corporation, with the right on the part of Knott Coal Corporation to mine all the coal underlying the same, through and by virtue of its coal mining lease from Kentucky River Coal Corporation.

At the trial of the cause before the late Hon. A. M. J. Cochran in June, 1931, the court ordered that only the issue of title should be tried at said term, and that all questions of damages should be held in abeyance pending the court's determination as to the ownership of the 100 acres of minerals in question. Accordingly, at that trial only such evidence and exhibits as related to the sole issue of title were introduced, albeit certain testimony

bearing on the nature, extent and quality of the alleged trespass unavoidably crept in.

On the 8th day of July, 1932 Judge Cochran handed down an exhaustive written opinion (Tr. Vol. I, pp. 49-69), in which he *found* and *held* that the plaintiff was entitled to a decree adjudging it to be the owner of the 100 acres of minerals in controversy.

On August 31, 1932, decree (denominated by Judge Cochran as a "final decree") was entered pursuant to the court's written opinion, wherein the court decreed (Tr. Vol. I, pp. 70-72)—

> (a) That plaintiff is the owner of all the coal and minerals of every description under said 100 acre tract.
>
> (b) That plaintiff is entitled to recover against the defendants, and each of them, according to their joint or several liability therefor, whatever damage may be ascertained to have been committed by them, or either of them, upon and under said 100 acre tract, by reason of the trespass described and alleged in plaintiff's bills of complaint.
>
> (c) That the cause be referred to the Hon. John W. Menzies as Special Master to ascertain what damages occurred to plaintiff's property by reason of the trespass set out and alleged in its petition.

Between October 1, 1932 and May 1, 1933 the Special Master held various and sundry hearings, at various and sundry places, when a large volume of testimony on the damage phase was adduced before him by the several parties, including both Kentucky River Coal Corporation and its lessee, Knott Coal Corporation.

Having concluded that the defendant, Knott Coal Corporation, in mining the coal in question from plaintiff's

land was but acting under the sanction of its lease from the defendant, Kentucky River Coal Corporation, whose innocent albeit negligent and careless agent it was, plaintiff on August 7, 1933, before the Special Master had returned his report or indicated to counsel his findings, tendered and asked leave to file its petition to dismiss the cause as to Knott Coal Corporation (Tr. Vol. I, pp. 113-116), which, by order entered on August 23, 1933 was granted (Tr. Vol. I, pp. 123-124). The Special Master, not knowing of the pendency of said petition, had previously completed and placed his report in the hands of the printer; and acting under instructions from Judge Cochran so to do (when, shortly after the tender of said petition by plaintiff, Judge Cochran advised him that the cause was being dismissed as to Knott Coal Corporation), the Special Master on August 11, 1933 filed his report upon the issues as originally made up and developed in evidence against the two defendants in which he found, *inter alia* (Tr. Vol. I, pp. 118-122)—

> "If the Kentucky River Coal Corporation alone was defendant it would be more simple to find a correct basis upon which to fix the damage. Would unhesitatingly find that the trespass was wanton, willful or done with a reckless disregard that amounts to willful trespass."
>
> "*That the Kycoga Land Company tract of one hundred acres occupied a key position, is fully evidenced by the testimony,* and officers of the Knott Coal Corporation admitted that there were millions of tons of coal behind this tract of land that could not be successfully mined except by hauling coal through the Kycoga Land Company tract. The reason for the Kentucky River Coal Corporation not emphasizing the lack of ownership of this (Kycoga) tract of land

at the time of the lease is apparent from the evidence and needs no comment."

"The evidence concerning this trespass resembles the No. 9 seam of coal. It outcrops in so many places in the record that it would be burdensome to refer to each and every out-crop of evidence showing or indicating that the trespass was a reckless one."

"Granting for the sake of argument that the Kentucky River Coal Corporation, or even its President himself, were not fully aware of the fact that the Kentucky River Coal Corporation did not own this tract, it still must be so apparent from a careful examination of the maps and title papers that this fact could have been ascertained by the Kentucky River Coal Corporation, and *its negligence in not discovering the fact that they did not own this particular tract must be considered to amount to a reckless and willful trespass* . . .

"The rule as to damage seems to be well settled, that the price of the coal at the tipple is the correct measure of damage for a wanton and willful trespass, but I cannot make myself believe that it would be fair or equitable to place upon these defendants (i. e. upon *merely negligent* Knott equally with its *willful, wanton* co-defendant), all of the strict penalties under the circumstances in this cause, and on the other hand it would be unfair and unequitable to require the plaintiff to accept for damage the bare ten cents royalty which would be allowed because of an innocent trespass *as the facts in this case do not justify finding an innocent trespass,* as that term is understood. (Phrase in parentheses supplied.)"

"Should the District Court think . . . the strict rule as to wanton and willful trespass should be allowed in this cause, I find in that event that the basic price per ton should be the price received for the coal at the tipple which average price is given by the defendant, Knott Coal Corporation, as $1.56 per ton."

On August 23, 1933 plaintiff tendered and asked leave to file its petition to re-refer the cause to the Special Master, with instructions and directions, *inter alia,* (Tr. Vol. I, p. 125, 126)—

> "FIRST: Ascertain and report back to the court what part, if any, of the testimony, exhibits and other proceedings presented and had herein by Knott Coal Corporation, from the institution of this suit down to the present time, the defendant, Kentucky River Coal Corporation, elects to adopt, have read and to use as a part of its defense to this cause, and what part said defendant does not so elect to adopt, have read and make use of, and conform the transcript of the testimony taken and the exhibits filed herein accordingly, and transmit and report the same back to the Court as a part of his report."
>
> "SECOND: Ascertain and report back to the Court— * * *
>
> "(b) The number of tons of coal mined and shipped by said defendant from plaintiff's tract subsequent to June 20th, 1928, and the damages that have accrued to the plaintiff therefor in the contingency the Court should hold plaintiff entitled to an award for damages under section 1244 a-1, Carroll's Kentucky Statutes." * * *
>
> "THIRD: Revise and extend the report filed by him herein on August 11th, 1933, consistent with the dismissal of this cause as to the defendant, Knott Coal Corporation, and with the testimony and record when conformed by him as specified in Paragraph 'First' hereof, and so as to embody his additional findings of fact as specified and directed in paragraph 'Second' hereof."

Judge Cochran died before acting upon the petition, which was filed (and sustained in part and refused in part) by his successor, the Hon. H. Church Ford, by order

entered on November 18, 1936. (Tr. Vol. I, p. 193).

On September 20, 1933, plaintiff filed exceptions to the Master's reports, which included, *inter alia* (Tr. Vol. I, pp. 140-144)—

> *Exceptions First and Second* (in effect): In that the Special Master, having found and reported that Kentucky River Coal Corporation had knowingly, willfully and wantonly mined, shipped and sold in commerce 114,148.66 tons of plaintiff's coal, computed plaintiff's damages therefor at 56.7 cents per ton instead of the approximately three times greater price for which said coal had been sold on the market.

On January 8, 1934, plaintiff filed its Fourth Amended and Supplemental Bill of Complaint (Tr. Vol. I, pp. 144-148), and on June 26, 1934, its Fifth Amended Bill of Complaint (Tr. Vol. I, pp. 171), so as to make its pleadings conform to the evidence adduced before the Special Master and to the circumstance of the cause having been dismissed as to Knott Coal Corporation.

On the 27th day of August, 1936, Judge Ford (lately Judge of the Circuit Court of Scott County, Kentucky, and but recently appointed to succeed the late Judge Cochran as Judge of the District Court) filed his opinion on the damage issue, (Tr. Vol. I, pp. 174-184) wherein, accepting Judge Cochran's opinion on the tital as final, he *found, inter alia*: (a) "that it can *scarcely be doubted* that *at all times he* (respondent's president, *Dudley*) *knew this* (petitioner's) *land* was *located somewhere within* the vast territory *embraced in the lease*"; (b) that while the record clearly warranted the conclusion that defendant's president "did not exercise due care to ascertain the limits of his company's property *beyond which he should not have permitted the operation of his lessee to go,*" such

conduct was not necessarily inconsistent with an unintentional or inadvertent trespass; (c) that although *"the result of negligence,"* the trespass should not be regarded as "willful" within the meaning of that term as used in the law dealing with trespass; (d) that the testimony indicates that 113,680 tons of coal were mined or caused to be mined by defendant from plaintiff's land; (e) that the record "discloses no satisfactory or practical basis upon which to calculate the value of the coal in place except the customary royalty rate"—that "ten cents per ton appears to have been the customary royalty in that locality as evidenced by the fact that 2,000 acres adjacent to the land in question were leased at that rate"—that "this has long been the established criterion in Kentucky for measuring compensation to the owner for an unintentional and inadvertent invasion of his coal lands;" (f) that inasmuch as the fact of the trespass and conversion of plaintiff's property by the defendant was determined when Judge Cochran entered the decree on the title on August 31, 1932, plaintiff should be allowed interest on the value of the converted property from that date; (g) that "plaintiff's claim to *statutory penalties* must fall *along with its claim for enrichment by way of exemplary damages,* as such statutes are likewise applicable only in cases of willful trespass;" (h) that plaintiff is entitled to recover two cents per ton on the 26,473 tons of coal hauled by defendant from its own lands through plaintiff's tract.

On September 11, 1936, plaintiff filed its petition (Tr. Vol. I, p. 185) wherein it stated counsel's understanding that the Court would hear counsel's oral argument before rendering his opinion; pointed out that the Chancellor's

opinion on the damage phase had been formed from the perusal of a record which did not contain material maps that had been filed and identified for use by the court in deciding the cause and temporarily withdrawn from the record, and without the court having ruled upon various and sundry motions and petitions tendered and/or filed before the late Judge Cochran, a ruling on which is material to plaintiff's cause of action: and *prayed* that the court's opinion be withdrawn; that all proffered motions and exceptions be ruled upon and petitioner given an opportunity to take such steps as it may be advised to take by reason of such rulings; that all the maps and other exhibits which were "identified" for use and were in fact used by the late Judge Cochran and the Special Master be brought before the court, for its use in deciding the issues joined, and made a part of the official record and that the cause thereupon be set down for oral argument upon such date and at such place as may be agreeable to the court. On the same date plaintiff also filed its separate motion (Tr. Vol. I, pp. 189-192) requesting the Court to make specific findings of fact and separate conclusions of law in respect of nineteen distinct specifications.

On November 18, 1936 the Court (by *Ford,* Judge) entered (1) a *nunc pro tunc* order filing the petition tendered before Judge Cochran by plaintiff on August 23, 1933 to re-refer the cause to the Special Master with instructions to conform his report and the record agreeably to the dismissal of the cause as to Knott Coal Corporation, etc., which the court denied in all material respects (Tr. Vol. I, p. 193); (2) an order (Tr. Vol. I, pp. 195-6) filing the petition tendered before him by plaintiff on September

11, 1936, wherein the court, (a) noted the incorporation into the record and consideration by him of certain material maps which he had not seen when writing his final opinion in the cause, and (b) denied plaintiff's motion for oral argument; and (3) an order (Tr. Vol. I, p. 196) filing and denying the motion filed by plaintiff on September 11, 1936, for specific findings of fact and separate conclusions of law, and making the written opinion of the Court a part of the record herein.

On November 18, 1936, final decree was entered by the Hon. H. Church Ford, Judge, in accordance with his opinion (Tr. Vol. I, p. 197), whereby it was adjudged, ordered and decreed, *inter alia,* that plaintiff recover of the defendant—

> First: The sum of ten (10c) cents per ton on 113,680 net tons of coal unlawfully mined by defendant from plaintiff's land, to-wit, the sum of $11,368, with interest from August 31, 1932, at the rate of six per centum per annum.
>
> Second: The sum of two (2c) cents per ton on 26,473 net tons of coal transported by defendant through plaintiff's land, to-wit, $529.46, with interest as aforesaid.

On February 16, 1937, plaintiff filed its petition for appeal to the Circuit Court of Appeals from said final decree, together with its assignment of errors (Tr. Vol. I, pp. 204-211); and an appropriate order granting said appeal was entered (Tr. Vol. I, p. 213).

On February 17, 1937, defendant perfected a cross-appeal from the decrees of August 31, 1932 and November 18, 1936 (Tr. Vol. I, pp. 216-223) on the title issue.

By "Stipulation" entered into on October 15, 1938, when the condensed statement of evidence material to

both appeals was in process of preparation, it was stipulated between the parties, *inter alia,* as follows (Tr. Vol. II, pp. 244-246):

> "1. That the tonnage of the No. 9 seam of coal mined, shipped and sold by Knott Coal Corporation from the 100 acre tract of land in controversy in this cause was 113,680 tons, as determined and found by the District Court in the decree entered in said cause on the 18th day of November, 1936; the cross-appellant, Kentucky River Coal Corporation, having hereby waived and abandoned its assignment of error as to such determination and finding.

The Salient Facts (mostly documentary) Upon Which Petitioner Relied as Showing the Trespass was "Willful," and "Knowingly" and "Intentionally" Committed.

In the fall of 1918, Messrs. L. N. and Hugh Buford (father and son), successful coal operators in the Kentucky River field above Hazard, Kentucky, entered into conversations with Kentucky River Coal Corporation, through its President, W. S. Dudley, of Lexington, Kentucky, with respect to a mining lease on an hitherto undeveloped seam of coal of extraordinary thickness which appears high up in the dividing ridge between the waters of Carr's Fork and Lott's Creek, tributaries of the North Fork of the Kentucky River in Knott County, Kentucky. While the Bufords were given to understand that Dudley's company owned all or certainly the essential acreage of the seam in this dividing ridge, the fact is that at that time said company owned less than two-thirds of such acreage.

During the next two or three ensuing months the Bufords, at the expense of the Kentucky River Coal Corporation, prospected and made an outcrop survey of the

most desirable acreage of the No. 9 seam, which, unknown to them, included various and sundry tracts of land which Kentucky River Coal Corporation did not own, among which was Petitioner's William Kelley one hundred acre mineral tract.

In the spring and early summer of 1919 Mr. Dudley, for his company, made an unsuccessful effort to purchase the one hundred acre William Kelley tract from petitioner, through petitioner's agent and attorney, Buford C. Tynes, for the past eight years a resident of Hazard but who in May of that year had moved to Huntington, West Virginia (see Tynes' testimony, Tr. Vol. II, p. 444). Notwithstanding its inability to purchase the tract, under date of August 2, 1919, Kentucky River Coal Corporation entered into a so-called letter-lease contract with the Bufords (Tr. Vol. III, p. 61) whereby it obligated itself in due season to execute to the Bufords' newly formed mining company, Knott Coal Corporation, a lease on an agreed boundary of land, carrying an acreage of the No. 9 seam selected by the Bufords as being most desirable in thickness of seam and as lending itself to a proper economic development of the seam. The exterior bounds of the tract described in the lease ran up the center of the dividing ridge between Carr's Fork and Lott's Creek, thus making the leasehold what is known as a "split-ridge" mining proposition, by which is meant that the coal seam included in the lease lay on one side only of the center of the ridge—the north side. Petitioner's one hundred acre tract is situate at such a point in the leasehold boundary as to trap off and render unminable and inaccessible (except by entries driven

through, or by outside tramroads constructed on, petitioner's tract of land) more than two-thirds of the No. 9 seam of coal embraced in Knott's Kentucky River Coal Corporation leasehold. (See Original Map No. 7; also testimony of *Hugh Buford,* President, Knott Coal Corporation, at Tr. Vol. II, p. 367, to the effect that his company would not have taken the lease had it known of petitioner's adverse ownership of the William Kelley one hundred acre tract). While this letter-lease contract represented and definitely stated that Kentucky River Coal Corporation did *not* own *three other tracts* which were contiguous to the boundary described in the letter-lease (the No. 9 seam of coal under which the Bufords desired but did not deem essential to the economic development of the leasehold boundary as a whole and which Kentucky River Coal Corporation obligated itself to acquire, if possible, and if acquired to include in the lease) it *definitely and particularly represented* that said company *did* own petitioner's said one hundred acre tract.

By the fall of 1921 Knott Coal Corporation had expended approximately $450,000.00 in the construction of a branch line of the L. & N. Railroad up Yellow Creek to its Kentucky River leasehold, and in the construction thereon of a coal tipple, incline and other facilities for its development, under the authority of its still unrecorded letter-lease contract of August 2, 1919, and was proceeding with the driving of its entries up the dividing ridge toward the tract in controversy. It was not until the 20th day of July, 1922 that it obtained from its lessor and actually recorded in the office of the Clerk of the County Court of Knott County the formal lease (bearing date the 15th day of March, 1921) in conformity

with its executory contract of August 2, 1919. The lease as thus executed and recorded described the leasehold boundary by metes and bounds description which conformed precisely to the general description contained in the executory contract. Attached to the new lease, and made a part thereof, was a blue print map which showed the Kentucky River leasehold boundary to be in one solid tract, shown shaded in red on the map, and the three adjoining non-essential tracts which the lessor undertook to acquire and include in the lease, if possible, shown shaded in yellow (For copy of this lease and accompanying map see Binder "A" of "Original Papers," Item 32; for the exact location of plaintiff's tract within the confines of said leasehold boundary, see Original Map No. 7).

In the early fall of *1922* (1923, as stated in the transcript, is incorrect, as the context clearly shows), Dudley approached Tynes again about the purchase of the tract in controversy, not *eo nomine* but in conjunction with other tracts of Tynes' client, just as he had done in the spring and summer of 1919, and with the same results; and in December 1922 and January and February 1923, Dudley had his trusted land agent and field man of twenty-five years standing, E. C. (Bird) Holliday, communicate with Tynes by letter on the subject of Kentucky River Coal Corporation's purchasing various and sundry tracts and blocks of land from Tynes' client, (See *Tynes'* testimony, Tr. Vol. II, pp. 444, 445; *Holliday's* testimony, Tr. Vol. II, pp. 428-442), instructing him not to divulge to Tynes the fact that he wished to purchase petitioner's William Kelley tract. Following Holliday's approach to him, Tynes wrote Dudley a significant letter of February 3, 1923, (photostatic reproduction of which appears as

"Appendix A" to this Petition and Brief, for an understanding of which the Court should have before it Dudley's paneled Kentucky River Region Map—*Original Map No. 17*) in which he listed certain tracts of his principal, giving the names of the original grantor, the stream upon which situate, the number of acres, and the tract number assigned to the respective tracts upon Dudley's so-called Kentucky River Region map, a replica of which was in Tynes' possession (the tract in controversy being described in paragraph numbered "2nd" of his letter), the sale of which Tynes' letter stated he was prepared to discuss with Dudley on a trip he contemplated making to Lexington on or about February 12th.

On February 23rd (1923) Tynes met Dudley in the latter's office at Lexington, when a long discussion of Tynes' letter to Dudley of February 3rd ensued, in the course of which Dudley identified and noted on his map, with lead pencil "loops", inside of which he placed the initial of Tynes' client, the precise location of petitioner's William Kelley 100 acre mineral tract in controversy (For the original of Tynes' letter to Dudley of February 3rd, 1923, bearing pencil notations contemporaneously placed thereon by Dudley, see Binder "A" of the "Original Papers", Item 33; for Dudley's personal field-copy of the Kentucky Region map, see the clothbound paneled Original Map marked 17; for Tynes' testimony concerning said letter and map, and his said meeting with Dudley, see Tr. Vol. II, p. 445; for testimony of respondent's Chief Engineer and Vice-President, G. Turner Howard, concerning Dudley's notations, see Tr. Vol. II, p. 313). Nothing came of this meeting between Mr. Dudley and Mr. Tynes.

At about October 1, 1926, Knott Coal Corporation extended its mine workings into petitioner's tract of land, and as at about April 1st, 1929, had mined and shipped from said tract *114,148.66* tons of the No. 9 seam of coal (as found by the Special Master, at Tr. Vol. I, p. 122, or *113,680* tons of coal, as incorrectly computed and found by the District Judge at Tr. Vol. I, p. 182, but accepted and agreed upon by the parties in the Stipulation appearing at Tr. Vol. II, p. 244). On April 4th (1929) Kentucky River Coal Corporation notified Knott Coal Corporation to desist from further mining in the tract in controversy. The reason assigned for such notice is not clearly disclosed upon the record but may be correctly inferred from rumors which had become current among the natives of the vicinity that Knott had driven its entries into a tract of land that did not belong to its lessor (See the so-called Hardaway-Buford correspondence, at Tr. Vol. III, pp. 85 to 90). On this same April 4th, respondent's land agent and field man, E. C. Holliday, telephoned from his company's office in Lexington to Tynes at Huntington on the pretext of employing him to write a contract between his company and parties to whom it was selling a large boundary of timber. In an ensuing conversation with Tynes at Huntington, Holliday casually brought up the purchase by his company of an unidentified group of petitioner's mineral tracts in Eastern Kentucky, which Tynes told Holliday he would discuss with Mr. Dudley personally in the near future (Tr. Vol. II, p. 253). Under date of April 11, 1929, Holliday wrote Tynes a further letter about the timber deal, with a significant post-script about the purchase by his company of petitioner's "little scattered mineral tracts we

talked about." (See letter, Tr. Vol. III, p. 69). In due course Tynes met Dudley at Lexington, where it came to light for the first time that the tract in controversy was the real object of this and Holliday's and Dudley's 1919 and 1922-23 contacts with Tynes (See testimony of *Holliday* to such fact, Tr. Vol. II, pp. 428-442).

In view of Dudley's great anxiety to commit Tynes, then and there, to a sale of the tract, and of his offer to Tynes for the tract of a price per acre many times that mentioned on previous occasions, Tynes deferred decision in the matter until he could check up on the information Dudley gave him as to the proximity of the tract in question to the nearest mining development in Kentucky River Coal Corporation's own lands in that general vicinity, which Dudley told Tynes was five or six years in point of time and two miles in point of distance, and verify the map which Dudley had his Chief Engineer, G. Turner Howard, make and hand Tynes there that day which represented, contrary to the fact, that the tract carried no mineable acreage whatever of the No. 9 seam of coal (See *Tynes'* testimony, Tr. Vol. II, pp. 254-258; see said map in Envelope of Original Maps, No. 9). On or about May 8th (1929) Tynes sent Captain Ira M. Nickell of Ashland, Kentucky, petitioner's long-time land agent and local attorney, to verify the information and map given him by Dudley. It was from this investigation made by Nickell of the records of Knott County that Petitioner became apprised for the first time of respondent's lease to Knott, and that its 100 acre William Kelley tract was included in said lease. On the following day Nickell went up on the ground and upon interrogating the natives in the vicinity of petitioner's tract ascertained to his satis-

faction (there were no outward signs of such to be seen, since the tract had been penetrated by subterranean tunnels driven into it from adjoining lands) that Knott Coal Corporation had already penetrated and mined seven or eight acres of plaintiff's No. 9 seam of coal.

On May 15th (1929) Dudley met Nickell and Tynes, at Tynes' request, at the Phoenix Hotel, Lexington, when Dudley, upon being confronted by Tynes with Nickell's discovery, said:

> "That is Knott's funeral, not ours. Knott Coal Corporation had no business going on your tract. Our lease protects us. All we have got to do is pay them back the ten cents we got on that tract and we step out."
>
> —*Tynes' testimony*, Tr. Vol. II, p. 261.

During the next ensuing two weeks after this Lexington meeting between Tynes, Nickell and Dudley, numerous conversations took place and correspondence passed between Mr. Tynes, Mr. Dudley and Mr. Hugh Buford (President of Knott Coal Corporation) respecting the trespass on petitioner's land, and between Buford and Dudley respecting the responsibility and liability of their respective companies on account of the trespass: the latter culminating in a letter from Dudley to Buford under date of June 4, 1929 (Tr. Vol. III, p. 64) which reads as follows (italics and text in parentheses supplied):

"KENTUCKY RIVER COAL CORPORATION
LEXINGTON, KENTUCKY

June 4th, 1929

Mr. Hugh Buford, President,
Knott Coal Corporation,
Lexington, Ky.

In Re: Claim of Webb and Hoppin
(Petitioner's direct grantors as respects the tract in controversy)

Dear Sir:

I am in receipt of your letter of the 25th ultimo regarding the above claim.

By reference to your lease you will find that it does not specifically state that the A. D. Bright (Webb & Hoppin's grantor) tract is included in it, but the description of the outside boundary as set up in your lease does include this tract.

While it is true the tract is included in the outside boundary *this Company never claimed title to this tract,* but it expected or *hoped* to acquire the tract *in which event* it would have been added to your lease.

By reference to your lease, Page 3, first paragraph, you will note the following:

"It being understood and agreed that all the rights and privileges herein granted are, and shall be construed as, limited to such rights and privileges, only as the lessor as owner or grantee posseses, or has the lawful right to grant, and that where the lessor owns the mineral rights only, this lease shall not be construed as leasing or attempting to lease to the lessee any rights or privileges in the surface or timber rights or any rights whatsoever, other than such as are granted unto the lessor in and by the deeds under which it claims the mineral rights."

From this you will note that the rights and privileges granted in the lease are "limited to such rights and privileges only as Lessor as owner or grantee possesses." Consequently *this Company not possessing any rights or privileges so far as the A. D. Bright tract is concerned,* it did not convey or attempt to convey them, even tho the tract is included within the outside boundary of your lease.

By reference to Page 17 of your lease, you will find Article 17, which is a part of the covenants of the lease. This covenant provides that in case of failure of ownership of any of the coals described in this lease, the Lessor will pay back to Lessee a sum equal to 10 cents per ton for all coals mined, to which the Lessor did not have title.

We are willing to comply with the terms of this covenant, as soon as it has been determined the quantity of coal mined from this tract, *to which this company does not have title.*

Your very truly,

(Signed) W. S. DUDLEY,
President.

WSDSCS.

The original of this letter handed to Hugh Buford, in person, June....."

The Kentucky River Coal Corporation had come into being in 1915 as the result of a merger of several corporations which owned extensive lands and minerals in the Kentucky River field and which had common directors and the same president and General Manager—the Hon. C. Bascomb Slemp, who became a director of Kentucky River Coal Corporation. There were filed in evidence in the cause various and sundry deeds through which some one or another of these companies had acquired tracts of land or mineral adjoining the tract in question and which specifically referred to petitioner's

tract as being a tract of "*mineral sold to A. D. Bright,*" petitioner's remote vendor and trustee (See, notably, deed from William Kelley to Hamilton Realty Company, dated December 10th, 1910, Tr. Vol. III, p. 36). At the trial before Judge Cochran on the title issue there was introduced in evidence the record of a suit in equity (which involved the tract of mineral involved in this suit) entitled *John Riley Kelley & Manford Kelley* v. *R. K. Richards* (in whom the legal title to the tract in controversy at the time reposed), instituted in the Knott County Circuit Court on May 16, 1906, which the defendant had removed to the Federal District Court at Catlettsburg, Kentucky, together with certified copies of deeds executed between the parties in 1911 in compromise and settlement of said suit (See *deed* from William Kelley, et. al. to Webb & Hoppin, Richard's direct grantees, Tr. Vol. III, p. 22; *deed* from Arthur D. Bright, Trustee, to John Riley Kelley, et. al., Tr. Vol. III, p. 26; *deed* from John Riley Kelley, et. al. to Kentucky River Consolidated Coal Company, Binder "B" of "Original Papers", Item 51); also a map which the Hon. C. B. Slemp (one of whose companies held options from the two Kelleys and which, according to Judge Cochran's opinion, were the instigators of the Kelleys in bringing the suit, and their advisors in its settlement) had prepared and sent Richards' attorney, Judge John F. Hager, as a proposed basis of compromise and settlement. (See Original Map No. 1). Speaking of this suit, and of the participation in it of Mr. Slemp (as president and general manager of the different companies mentioned, later merged into Kentucky River Coal Corporation, of which he was a director) Judge *Cochran,* in his opinion on the title issue, said:

"The Kentucky River Coal Company and its assignee, the Kentucky River Consolidated Coal Company, were privies to that suit and actual parties to the settlement thereof. They became such because of the fact that they were interested in and parties to the controversy involved therein . . . . Though neither the Kentucky River Coal Company nor the Kentucky River Consolidated Coal Company joined in the deed of the Kelleys to Webb & Hoppin (pendente lite grantees of R. K. Richards) of June 5, 1911, it is exactly the same as if they had done so. They were parties to the contract of settlement, pursuant to which it was made. They instigated and brought it about, and, by reason thereof, acquired the right to the minerals to the 142 acres (which Richards and Webb & Hoppin relinquished to the Kelleys) free from any claim on the part of Webb & Hoppin. The minerals in the 142 acres were accepted in full satisfaction of any liability on the part of John Riley Kelley and Manford Kelley under the contract. Thereupon those contracts (from the Kelleys to the Slemp companies) came to an end, and all rights thereunder ceased to exist"—Tr. Vol. I, p. 67; (text in parentheses supplied.)

Such is but the barest resume of random portions of the documentary evidence upon which petitioner relied to sustain its contention that the trespass was "willful and wanton" so far as Kentucky River Coal Corporation was concerned, as found by the Special Master, and as such is, under the controlling Kentucky authorities, compensatable on the basis of the price at which the coal converted in the course of the trespass was sold in the open market, and was *not* of the so-called "innocent" or excusable" type, where the damages ensuing from the trespass are properly computable on the basis of the value of the coal in place before severance. To have here re-

counted less would have been an omission upon the part of the petitioner to give this Honorable Court a yardstick by which to pass judgment upon the alleged error of the District and Circuit Courts in applying the law of the case to the facts.

In addition to such *basic compensatory* damages, petitioner sought to recover "double the market value" for so much of its No. 9 seam of coal (to-wit: 23,432.86 tons) as was mined after *Carroll's Kentucky Statutes,* Section 1244a-1, became operative.

The Proceedings in the Circuit Court of Appeals

On February 8, 1940, the cause was argued before the Circuit Court of Appeals with three of the five judges sitting, namely, Judges *Simons, Allen* and *Arrant.*

On April 3, 1940, the Court (speaking through *Judge Simons*) rendered its opinion wherein the court—

> (1) *Held,* that the decree entered in the cause by the District Court (on August 31, 1932 by the late *A. M. J. Cochran,* District Judge) on the title issue was a final decree; and that the cross-appellant (the respondent) having failed to prosecute its cross-appeal therefrom, as well as upon the merits of such cross-appeal, same must be dismissed,
>
> (2) *Found,* that in its claim for damages on account of coal mined or caused to be mined by respondent from Petitioner's land in excess of the approximately $12,000.00 awarded Petitioner by the District Court as for an "innocent" trespass, Petitioner "*mainly relies*" upon a punitive Kentucky Statute which the court correctly interprets as making it "a misdemeanor 'if any person shall willfully and knowingly mine or remove coal from the lands or premises of another of the value of $20.00 or more without color of title in himself to the coal so mined and removed', and in addition to a fine to be imposed, provides that

the person guilty of such misdemeanor shall be 'liable in damages to the owner, double the market value of such coal so wrongfully mined and removed,' the term 'person' being defined to include corporations." (Tr. Vol. III, p. 129).

(3) *Recognized,* that according to the findings of the Special Master the trespass was willful, but *Held,* in view of the fact that the order of reference "reserved full power of review and specifically denied any presumption to be attached to the Master's findings . . . . . (that) they were not to any extent binding upon the independent judgment of the (district) court, nor do they bind us. *Atherton* v. *Anderson, 99 Fed. (2d) 883, 890.* This is not to say that inferences may not be indulged in favor of the master's findings in the usual case where there is conflict of direct evidence, and the master has seen and heard the witnesses and the court has not. Compare *Atherton* v. *Anderson, 86 Fed. (2d) 518, 522.* But the master's findings are based wholly upon inference, the reasonableness of which may be as fairly determined by the court as by him, and in this situation any presumption in favor of his conclusions can be of but slight importance. This is particularly true when analysis of his reasoning discloses that he drew no distinction between mere negligence and willful or wanton disregard of others' rights." (Tr. Vol. III, p. 130).

(4) *Found and Held,* that the respondent may not have "exercised due care to ascertain the limits of its property beyond which it should not have permitted the operations of its lessee to go, but this of itself is not necessarily inconsistent with an unintentional or inadvertent trespass"; that under the Kentucky Rule "a trespass if not explained is presumed to be willful, and the duty to show inadvertence, bona fide belief of right is upon the trespasser. *Elkhorn-Hazard Co.* v. *Kentucky River Coal Corp., 20 Fed. (2d) 67 (C. C. A. 6)*; *Kentucky Harlan Gas*

Coal Co., 245 Ky. 234"; that "whether this is of the class of presumptions that are not evidentiary in their nature and so disappear as soon as a reasonable explanation is presented to rebut the facts upon which the presumption is founded. (*Equitable Life Assurance Co. of U. S.* v. *Sieg,* 74 Fed. (2d) 606—C. C. A. 6", or "whether of that class which requires those against whom it is asserted to do more than merely go forward with the evidence, we have no occasion to decide, since under either interpretation we consider the issue as to the willfulness of the trespass *at large upon the proofs.*" (Tr. Vol. III, p. 130).

(5) *Found and Held,* that "whatever may have been the subsequent relations between appellant (petitioner) and appellee (respondent), and between the appellee and its lessee, and whatever the inferences now sought to be drawn from the long series of negotiations, communications and maps" referred to in the testimony, "any determination of the quality of the trespass as willful . . . *must stem from the lease* (of respondent) *to the Knott Coal Corporation, and the circumstances under which it was executed*"; that "whether Dudley, the president of the appellee corporation, knew precisely where plaintiff's one hundred acre tract was located is not clear", but he probably "*did know*" that the tract was "*somewhere within the outer boundary*" of his company's lease to Knott Coal Corporation, "but such knowledge, actual or constructive, is far from sustaining an inference that it was included in the Knott lease with the deliberate purpose that Knott should appropriate coal not belonging to the (its) lessor;" that no inference can be drawn from Dudley's renewal of his efforts to purchase the tract from petitioner, after the trespass had been committed, at a price greatly in excess of that offered plaintiffs in 1919, and from his efforts to keep the fact of the trespass secret from petitioner until he might buy the tract, that his company intended that its lessee, Knott Coal Corpora-

tion, should appropriate petitioner's coal to the benefit and profit of respondent (Tr. Vol. III, p. 132); that "guilty of negligence Dudley may have been in speculating upon his ability to purchase the property . . ., and in failing to follow Knott's operations in the region of plaintiff's land closely enough so as to prevent Knott's entry thereon before he had concluded the purchase of the property, but . . . something more than mere negligence is required to fasten upon the Appellee the penalty of a statute which, by its express terms, is to be imposed not upon negligent trespassers, but upon those guilty of willful or wanton trespass."

(6) *Found,* that the rule in Kentucky is that the measure of damages for an "inadvertent" and "excusable" mining of coal from the lands of another is the value of the coal in place; *Held,* that the trespass in question was inadvertent and excusable under such rule and that the measure of damages for such trespass was the ten cents per ton found by the District Court to be the value of the coal in place before severance; and *affirmed* otherwise the decree of the district court.

On April 3, 1940, decree was entered in said Court consonant with its opinion (Tr. Vol. III, p. 125).

On May 2, 1940, petitioner filed a Petition for Rehearing (Tr. Vol. III, pp. 135-169). After more than five months, to-wit, on October 8, 1940, said petition was denied (Tr. Vol. III, p. 171).

Opinion of Circuit Court of Appeals

The opinion of the Circuit Court of Appeals for the Sixth Circuit rendered in this case is reported in 110 Fed. (2d) page 894, and also appears in Tr. Vol. III, pages 126-134.

The Basis of this Court's Jurisdiction

(1) The date of the decree sought to be reviewed herein is April 3, 1940, (Tr. Vol. III, p. 125); the date of order denying a rehearing was entered on October 8, 1940. (Tr. Vol. III, p. 171).

(2) The jurisdiction of this Court is invoked under the provisions of Section 240, Judicial Code, as amended (U. S. C. A., Title 28, Sec. 347 (a)).

Questions Presented.

The several questions presented are inherent in the reasons relied upon for the allowance of the writ, as next hereinafter stated, and will not be here duplicated.

Reasons Relied on for Allowance of the Writ

Petitioner earnestly contends and respectfully submits that the Writ of Certiorari should be granted to review the decision of said Circuit Court of Appeals for the following reasons:

(1) Said Court has decided important questions of local law in conflict with applicable local decisions, in that

(a) It has disregarded the rule laid down by the Court of Appeals of Kentucky that every trespass is presumed to have been "knowingly" and "willfully" committed unless the trespasser *both allege and prove* such facts as show his acts were *not* "willful" and "knowingly" committed, or were *not* "intentional";

(b) It has interpreted and applied evidence which, under the rules laid down for such interpretation and application by the Court of Appeals of Kentucky (the court of last resort in said State), is uniformly held to constitute a "willful" trespass (compensatory damages for which is the value of the converted coal when sold by the trespasser), to be a trespass of the "inadvertent" and "excusable" type (damages for which is the value of the coal in place before severence by the trespasser);

(c) Said Court, in derogation of petitioner's substantive right to have the damages accruing to it from defendant's trespass measured by the yardstick employed by the Court of Appeals of Kentucky, has, in practical effect (and *ex moro motu*), invoked against petitioner all the elements of an equitable estoppel which, under the rules laid down by the Kentucky Court, defendant must needs have *both alleged and proved* if it would mitigate a trespass otherwise deemed willful or intentional, yet did neither:

with the consequence that said decision of the Circuit Court of Appeals permits the use of one rule of law in like cases if tried in the Federal Court and a different rule if tried in the state courts of Kentucky; and in so doing said court, disregarding the rule laid down by this Court in *Erie Railroad* v. *Tompkins,* 304 U. S. 64, and in numerous other later decisions in which it overruled its decisions in *Swift* v. *Tyson,* 16 Pet. 1, 18, *Black & White Taxicab & Transfer Co.* v. *Brown & Yellow Taxicab & Transfer Co.,* 276 U. S. 518, and other cases, has denied petitioner a right guaranteed it by the Federal Constitution.

(d) While the court in terms recognized these established rules of Kentucky law, and pretended to apply them, in effect it avoided that obligation by drawing from the evidence an inference (contrary to the findings of the Master, and as we contend, contrary to the undisputed evidence) that *Dudley, respondent's president,* entertained no willful purpose to commit the trespass. This conclusion, even if it could be justified, is, we submit, entirely immaterial, for the reason that the uncontroverted documentary evidence shows that the respondent corporation, from its own maps, records, and its privity to the compromise and settlement of the case of John Riley

Kelley & Manford R. Kelley v. R. K. Richards (see p. 24 supra) had, and was held by Judge Cochran in his opinion on the title issue to have had, at all times, full and complete knowledge of the exact location of the tract and its non-ownership thereof; and therefore that its trespass was necessarily intentional and willful.

(e) It has misconceived petitioner's application and restriction of Carroll's Kentucky Statutes, Section 1244(a)-1, which reads—

> "*Unlawfully Removing Coal from Another's Land.* —That if any person shall willfully or knowingly mine or remove coal from the lands or premises of another of the value of twenty dollars ($20.00) or more without color of title in himself to the coal so mined and removed, he shall be guilty of a misdemeanor and shall be fined not less than one hundred dollars ($100.00) nor more than five thousand dollars ($5,000.00), and in addition be liable in damages to the owner, double the market value of such coal so wrongfully mined and removed. The word 'person' as (used) herein shall include firms, associations, partnerships and corporations. (1928, c. 165, p. 555,"

to only so much of said coal (less than one-fourth) as was mined from petitioner's land after that Statute became effective, and has erroneously assumed that petitioner's contention for the f.o.b. value (*single, not* "double"), as being no more than *compensatory* damages for the trespass in question when measured in accordance with the rule laid down by the Court of Appeals of Kentucky, is predicated upon said statute, notwithstanding the fact that over three-fourths of said coal is shown to have been mined before that statute was enacted: failing to take cognizance of the fact that petitioner's claim for the f.o.b. value of the coal is for no more than the compensatory damages awardable petitioner under the long settled case law of Kentucky.

(2) The decision rendered by said court is in conflict with the decision of other Circuit Courts of Appeals, in that it has adopted and substituted the finding of the District Judge in respect of the one important controlling issue of fact (namely, the quality of respondent's trespass) for the *contra* finding of the Special Master before whom such witnesses testified, at numerous hearings extending over a period of seven months, and who, as the Clerk of his court (from 1901 to 1929) during Judge Cochran's incumbency as District Judge, had come to know personally every witness who testified upon such issue, and who had been appointed by Judge Cochran as Special Master in this cause because of such circumstance—and because of the magnitude and controversial nature of the issues involved.

(3) Said court has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by the District Court, in respect to the foregoing and other matters of equal interest and importance, as to call for an exercise of this Court's power of supervision.